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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/660,961

09/12/2003

Alan Georgeff

57183

6353

7590

09/26/2006

Dennis H. Lambert & Associates  
7000 View Park Drive  
Burke, VA 22015

EXAMINER

HORTON, YVONNE MICHELE

ART UNIT

PAPER NUMBER

3635

DATE MAILED: 09/26/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

<b>Office Action Summary</b>	<b>Application No.</b>		<b>Applicant(s)</b>	
	10/660,961		GEORGEFF ET AL.	
	<b>Examiner</b>		<b>Art Unit</b>	
	Yvonne M. Horton		3635	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

#### Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

#### Status

- 1) ☒ Responsive to communication(s) filed on 09 August 2006.
- 2a) ☐ This action is **FINAL**.                      2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

#### Disposition of Claims

- 4) ☒ Claim(s) 1 and 4-11 is/are pending in the application.
- 4a) Of the above claim(s) \_\_\_\_\_ is/are withdrawn from consideration.
- 5) ☒ Claim(s) 9 and 10 is/are allowed.
- 6) ☒ Claim(s) 1,4 and 11 is/are rejected.
- 7) ☒ Claim(s) 5-8 is/are objected to.
- 8) ☐ Claim(s) \_\_\_\_\_ are subject to restriction and/or election requirement.

#### Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on \_\_\_\_\_ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.  
     Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).  
     Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

#### Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All    b) ☐ Some \* c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. \_\_\_\_\_.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

\* See the attached detailed Office action for a list of the certified copies not received.

#### Attachment(s)

- |  |   |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892)                     | 4) <input type="checkbox"/> Interview Summary (PTO-413)           |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____                                      |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08)          | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date _____  | 6) <input type="checkbox"/> Other: _____                          |

## DETAILED ACTION

### ***Continued Examination Under 37 CFR 1.114***

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 08/09/06 has been entered.

All claims are drawn to the same invention claimed in the application prior to the entry of the submission under 37 CFR 1.114 and could have been finally rejected on the grounds and art of record in the next Office action if they had been entered in the application prior to entry under 37 CFR 1.114. Accordingly, **THIS ACTION IS MADE FINAL** even though it is a first action after the filing of a request for continued examination and the submission under 37 CFR 1.114. See MPEP § 706.07(b). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of

the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

### ***Claim Objections***

Claims 1 and 4-11 remain objected to because of the following informalities: the claims are *still* directed to the subcombination of a "swimming pool guard"/"guard" apparatus only. However, the claims attempt to include recitations involving the combination of the "pool", "skimmer" and the "guard".

The applicant is reminded that a recitation of the intended use of the claimed invention must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. If the prior art structure is capable of performing the intended use, then it meets the claim.

In order to have the combination considered, the "pool and the skimmer" must be positively cited and cited in combination with the "guard". Until further clarification, the claims have been analyzed as merely a "guard" apparatus. Appropriate clarification and/or correction is required.

### ***Claim Rejections - 35 USC § 103***

The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

Claims 1,4 stand and claim 11 is rejected under 35 U.S.C. 103(a) as being unpatentable over US Patent #5,623,787 to ALI. Regarding claims 1 and 11, ALI discloses the use of a self-supporting guard (10) including an elongate body (24) formed of an open mesh material, column 2, line 28, having a top, bottom and opposite edges

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and an attaching means (28) for attaching the elongate body (24) across an opening (between sections 12 and 14). The guard (10) of ALI is flexible, column 2, line 26, such that it is shortened to a more arcuate form, column 2, lines 33-34 when put into position and lengthened when not in position, see figures 3 and 4; wherein the guard (10) is self-supporting, column 2, lines 39-49. ALI discloses the basic claimed guard except for explicitly being intended for use in a swimming pool adjacent the vertical wall of a skimmer and except for explicitly being adjusted to fit different sized openings.

Regarding the issue of the guard being used for a pool, a recitation of the intended use of the claimed invention must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. If the prior art structure is capable of performing the intended use, then it meets the claim. As far as the guard of ALI being a "swimming pool skimmer" guard, there is nothing precluding the guard of ALI from existing in the pool environment.

Further, the manner in which a device is intended to be employed does not differentiate the claimed apparatus from a prior art device satisfying the claimed structural limitations. Also, the claim entails functional recitations such as "fitting across a skimmer opening" and how the guard is positioned with respect to the "pool" or "skimmer". The applicant is reminded that in order to be given patentable weight, a functional recitation must be supported by recitation in the claim of sufficient structure to warrant the presence of functional. Any functional recitations in the claim have not been given patentable weight because in order to be given patentable weight, a function must be expressed as a "means" for performing the specified function, and must be

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supported by recitation in the claim of sufficient structure to warrant the presence of the functional language. In reference to the guard (10) being adjustable, as mentioned earlier, the guard (10) at first is flat and takes on a much lengthier dimension and when in position takes on a much shortened, arcuate length. Also, the guard (10) of ALI, is obviously capable of being attached to openings similar to the space between (12 and 14) or larger/smaller. Regarding claim 4, the guard (10) is made in one piece from a plastic material, column 1, line 49.

#### ***Allowable Subject Matter***

Claims 5-8 stand objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

Claims 9 and 10 remain as being allowable.

#### ***Response to Arguments***

Applicant's arguments filed 1/17/06 have been fully considered but they are not persuasive.

Regarding the applicant's argument that his preamble is now proper, the examiner has found nothing wrong with the applicant's preamble. However, the applicant's claims are limiting in that they merely claim a "swimming pool guard", which irrespective of it's use, is a "guard". In reference to the applicant's argument that if the preamble "gives life" to the claim then it should be construed as the balance of the claim, the applicant is correct. Nevertheless, the guard recited by ALI, although used in a different forum is not precluded from existing as a swimming pool guard in that clearly

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the attaching means (28), as detailed above, is capable of attachment to a pool and many other structures in general. As such, it remains that the claims are merely directed to a guard apparatus intended for use with swimming pool skimmers. Until the claims positively cite a swimming pool having a skimmer with a vertical wall in combination with a swimming pool skimmer, the claim will continue to be examined as only a guard.

In reference to the applicant's argument that the device of ALI would be rendered unusable from its intended purpose, although the intended use of ALI, is clearly recognized, it remains that there is nothing precluding ALI from being used or being capable of attachment to a swimming pool wall or any wall for that matter. Clearly, column 2, lines 29-39 detail the attachment of the ALI device; wherein, the closed edge (28) is inserted over the edge such that lateral edges engage opposed sections of the roof. Surely, this same device could have edges (28) engage sides of the pool such that lateral edges are inserted into a skimmer opening to thereby retain the device or even perhaps attachment by clips or screws.. Thus, the device of ALI is fully "capable" of the claimed performance without having modifications made thereto.


### ***Conclusion***

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Yvonne M. Horton whose telephone number is (571) 272-6845. The examiner can normally be reached on 6:30 am - 3:00 pm.

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If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Naoko Slack can be reached on (571) 272-6848. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.



Yvonne M. Horton  
Art Unit 3635  
09/17/06